87-1933

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SANDY GOLGART, AN INDIVIDUAL,
SANDY GOLGART SALES, A CALIFORNIA CORPORATION,
Petitioner

v.

CENTRAL PLASTICS COMPANY,
AN OKLAHOMA CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1) Is a post-trial motion which seeks to amend or alter that portion of a trial courts findings and conclusions which provides that each party should pay their respective fees a tolling motion under Rule 4(a)(4) of the federal rules of appellate procedure if both parties had requested attorney fees in their original pleadings?

2) In the event a party dismisses without prejudice a timely filed Notice of Appeal on the good faith belief that the motion described in Question One above was a tolling motion, is such party entitled to reinstate the appeal if it is subsequently determined that the motion was *not* a tolling motion?

3) Is a judgment which resolves the merits of the case and determines entitlement to fees final and, therefore, appealable even though the amount of the attorney fees is left to be resolved at a later time?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Sandy Golgart (Golgart), the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 23, 1988.

OPINION BELOW

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit, Case No. 87-2358 (D.C. No. 86-2026-W) (W.D. Okla.), rendered on February 23, 1988, is unreported and is attached as Appendix A in the appendix pages 1 through 2. The Findings of Fact and Conclusions of Law of the United

States District Court for the Western District of Oklahoma, Case No. 86-2026-W, rendered on the 18th day of June, 1987, is unreported and is attached as Appendix B in Appendix pages 1 through 23. The District Court's final Order of Judgment dated July 10, 1987, is attached as Appendix C.

STATEMENT OF JURISDICTION

This case was originally filed in the United States District Court for the Western District of Oklahoma under Title 28 U.S.C. Section 1332, Golgart, the plaintiff, being a citizen of the State of California and Central Plastics (Central), the defendant, being an Oklahoma corporation. Petitioner seeks a Writ of Certiorari from this Court to the United States Court of Appeals for the Tenth Circuit on an Order rendered by that Court on February 23, 1988, under 28 U.S.C. 1254(1). No Order granting extension of time to file Petition for Writ of Certiorari has been sought or granted.

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1291

STATEMENT OF THE CASE

This case was originally filed by Golgart against Central. The issue at trial was whether or not Central owed Golgart certain unpaid commissions on the sale of product. The matter was tried non-jury to the Honorable Lee West who entered his Findings of Fact and Conclusions of law on the 18th day of June, 1987. *The original findings of fact and conclusions of law of June 18, 1987 and the Judgment of July 10, 1987, provided that each party should pay their respective attorney fees.*

Thereafter, Golgart timely filed her Notice of Appeal on July 13, 1987. (A copy of the Notice of Appeal is

attached as Appendix D.) On the same day, Central filed its Motion to Amend the Court's Findings, Conclusions and Judgment for the purpose of determining that Central was entitled to an award of attorney fees as the prevailing party in the case. (A copy of that Motion is attached as Appendix E).

As a result of the filing of that Motion, counsel for Golgart and counsel for Central agreed that the pending appeal was premature under Rule 4(a)(4) of the Federal Rules of Appellate Procedure and the appeal was dismissed without prejudice on motion of the plaintiff. (Attached as Appendix F and G are the Plaintiff's Motion to Dismiss and the Order of Dismissal).

Thereafter, on August 5, 1987, the Trial Court entered its Order sustaining Central's Motion and determining that Central was entitled to an award of attorneys fees as the prevailing party. (A copy of that Order is attached as Appendix H). As provided in the Order, the Court directed that the parties either agree on the amount of fees or a hearing would be scheduled to determine the amount of fees.

On the 2nd day of September, 1987, Golgart filed a timely appeal from this Order on the basis and theory that the August 5th Order finally disposed of all issues pending, including "entitlement" to fees and that the amount of fees was a matter "collateral" to the issue of finality.

A copy of this Notice of Appeal is attached as Appendix I.

On the 23rd day of November, 1987, the Tenth Circuit advised both Golgart and Central that it was considering dismissal of the appeal on jurisdictional grounds. The Court further requested jurisdictional memoranda from both counsel. At no time prior to February 23, 1988, did the Court specify the nature of the alleged jurisdictional problem.

On the 8th day of December, 1987, Golgart's counsel submitted jurisdictional memorandum. (A copy is attached as Appendix J). It is interesting to note at this point that Counsel for Golgart and Central believed that the jurisdictional problem was not that the appeal was premature but that the first appeal should not have been dismissed. Counsel for Golgart argued that: 1) The Motion to amend with respect to entitlement of fees did in fact render the first appeal premautre under Rule 4(a)(4) of the F.R.A.P. That the amount of fees would be collateral to finality but not entitlement. The rationale for the argument was that both parties had asked for fees in their initial pleadings. 2) That even if the first appeal should not have been dismissed, counsel had acted on the good faith belief that the Motion to Amend had tolled the appeal time and that the Court had broad powers to permit the appeal to stand.

On October 26, 1987, after hearings before the Magistrate, the Trial Court entered its Order specifying the amount of fees to be paid to Central. (A copy is attached as Appendix K). A Motion to Reconsider that Order was denied on the 6th day of November, 1987. These Orders were not appealed from—for the sole and simple reason that Golgart did not and does not quarrel with the amount of fees, only the entitlement to such fees.

On February 23, 1988, the Tenth Circuit dismissed Golgart's Appeal on the basis that the August 5th Order was an interlocutory Order and not, therefore, Appealable, and that Golgart should have appealed the October or November Orders which specified the amount of fees to be paid.

GROUNDS FOR GRANT THE WRIT OF CERTIORARI

The Petitioner requests this Writ of Certiorari be issued on the grounds that the decision of the United States Court of Appeals for the Tenth Circuit is in *direct*

conflict with previous decisions on the issue by the United States Supreme Court and the Tenth Circuit.

Secondly, there is a split in the Circuits on the questions presented herein.

Thirdly, the decision is so abusive and oppressive with respect to Golgart's appellate's rights that it denies Golgart due process of law.

Finally, the decision has so departed from the accepted and usual course of judicial proceedings as to warrant review.

ARGUMENT AND AUTHORITIES

QUESTION ONE:

As indicated in the "Statement of the Case", Golgart filed a timely appeal from the original judgment of the Trial Court. Simultaneously with the filing of her appeal, Central filed a Motion to Amend or Alter the Court's Findings and Conclusions with respect to fees. Golgart and Central concluded that this motion was a tolling motion under Rule 4(a)(4) of the federal rules of appellate procedure and a dismissal without prejudice of the first appeal was filed in order to avoid a multiplicity of appeals.

Was Central's Motion a tolling Motion? The 6th Circuit has addressed this issue in *Penland v. Warren County Jail, 759 F.2d 524 (6th Cir. 1985):*

> "We hold that the time period was tolled. Although a post-judgment motion containing an initial request for attorney's fees will not toll the appeals period, *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); *Smillie v. Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983), the plaintiff initially requested attorney's fees in the complaint rather than in his post-judgment motion. Moreover, the magistrate ruled against Ward on the attorney's fee

> issue in the written opinion rather than deferring the question. This court has previously distinguished between requests for attorney's fees made in the complaint, and similar requests made only after judgment. See *Smillie*, 710 F.2d at 274. Since Ward's post-judgment motion was properly filed under F.R.C.P. 59(e), it tolled the period for filing the notice of appeal."

QUESTION TWO:

With respect to the second question presented for review, given the conflicting law in this area, Golgart's dismissal of the first appeal was clearly not an act of bad faith and was intended to avoid a multiplicity of appeals.

Golgart would refer the Court to *Aviation Enterprises, Inc. v. Orr*, 716 F.2d 1403 (D.C. 1983):

There is the following language in the syllabus at page 1404:

> "1) Federal Courts—Party may maintain otherwise-untimely appeals in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action which seemingly extended the appeal period if the court's action occurs prior to the expiration date of the official period and appellant filed a notice of appeal before expiration of the period apparently judicially extended."

There is the additional language found in footnote #25 at page 1406:

> "25. Notice of Appeal, filed March 5, 1982, *Aviation Enterprises, Inc. v. Orr*, No. 81-2497 (D.D.C.). It may be that the District Court's action on January 5, 1982—vacating in full yet at once partly reinstating its prior order—might better be regarded in the aggregate simply as a partial vacatur of that order. In this light, the order by which Huff Leasing is aggrieved—that which vacated the award to it—issued on November 25, 1981, not January 5, 1982. Because Huff's Leasing filed its notice of appeal far beyond

the 60-day period commencing November 25, 1981, pursuant to Federal Appellate Rule 4(a), it might seem superficially that Huff Leasing lost its appeal on this acount. See Fed.R.App.P. 4(a). Upon closer inspection, however, it becomes clear that there is no cause for concern. Even if we were constrained to regard the court's action on January 5, 1982 as effecting only a partial vacatur of its earlier order, a question we do not here decide. Huff Leasing's delayed filing of its notice of appeal is not fatal in this instance. *Courts long have permitted parties to maintain otherwise untimely appeals in "unique circumstances"—those in which the appellant reasonably and in good faith relies upon judicial action seemingly extending the appeal period, provided that the court's action occurs prior to expiration of the official period and that the appellant files a notice of appeal before expiration of the period apparently judicially extended. See Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 386-387, 84 S.Ct. 397, 398-399, 11 L.Ed.2d 404, 406-407 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 83 S.Ct. 283, 285, 9 L.Ed.2d 261, 263 (1962); *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (7th Cir.), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 237 (1981); *Webb v. Department of Health and Human Servs.* 696 F.2d 101 (D.C. Cir. 1982), at 105-106; 4 C. Wright & A. Miller, Federal Practice Sec. 1168 (1969). The case at hand presents us with such "unique circumstances." Within 60 days the District Court purportedly vacated its initial order and simultaneously issued a superseding order, from which a new 60-day period ostensibly would begin to run. Huff Leasing then filed its notice of appeal before expiration of the new period, apparently in reliance upon actual extension thereof. Accordingly, even if the District Court's action on January 5, 1982, cannot in fact establish a new 60-day period under Rule 4(a), Huff Leasing's appeal is not to be dismissed for untimely filing."

Based on this authority and Golgart's action in this case, counsel would request this Court to either conclude that the Appeal was timely or, in the alternative, permit the appeal under circumstances which reveal good faith reliance on the tolling effect of Central's Motion.

QUESTION THREE:

As further indicated in the "Statement of the Case", the Trial Court ultimately concluded on August 5th, 1987, that Central's Motion to Amend or Alter should be sustained and entered an Order to that effect. The Order did not specify the amount of fees.

Golgart, again relying on existing case law dealing with the subject, filed her second Notice of Appeal on the grounds that the Trial Court had now resolved all issues pending between the parties—including entitlement to fees—and that the amount of fees was a matter collateral to the merits of the case.

Golgart primarily relied on *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982) wherein the Court held that:

> "Despite the narrow ruling in *White v. New Hampshire* . . . in which the Court also declined to find that requests for attorney's fees are covered as costs under either Rule 54(d) or Rule 58, there are sufficient indications that the Court regards attorney fee requests as having legal issues, 'collateral to the main cause of action' requiring 'an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed'."
>
> "*We then conclude that judgments finally disposing of the merits are appealable even though questions relating to attorney fees have been left undecided.*" *Holderman v. Pennhurst*, 675 F.2d 628 (3rd Cir) (1982); overruling in part, *Craker v. Boring, Inc.* 662 F.2d 975 (3rd Cir) (1981). (emphasis ours)

Golgart relying on the prior rulings of this Court and the Tenth Circuit itself, believed, in good faith, that the

August 5th Order was "*final*" and, therefore, appealable with respect to *all* issues in the case except the *amount* of fees.

Counsel for Golgart at no time has evidenced lack of diligence or responsibility. Counsel has at all times attempted to avoid a multiplicity of appeals and duplicative work for all parties.

With all due respect, the actions of the Tenth Circuit in this case constitute an unconscionable abuse and denial of Golgart's appeal rights.

Not only is the decision contrary to prior rulings, but the timing of the decision on February 23, 1988, effectively prevented the curing of any alleged jurisdictional defects.

The actions of the Court in this case represent a gross distortion and misintepretation of rules of appellate procedure and concepts of "finality". The appellate process is a sacred right of all parties. The Court of Appeals exists for the purpose of serving litigants and the public. It does not and should not elevate the rules of procedure to a level of importance which ignores the fundamental rights and privileges of the parties—particularly in this instance where the case law interpreting those rules is favorable to Golgart.

This case does not represent an example of a party's reckless or dilatory disregard of time running on an appeal. *Two* appeals were filed and an eight page jurisdictional memorandum. Counsel, in the interest of the efficient administration of justice, was merely waiting to hear from the Tenth Circuit before proceeding further.

To allow this decision to stand is not only contrary to the existing law—it is a gross miscarriage of justice.

CONCLUSION

In conclusion, the Petitioner, Sandy Golgart, respectfully prays this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-2358

(D.C. No. 86-2026-W)
(W.D. Okla.)

SANDY GOLGART, an individual;
SANDY GOLGART SALES, a California corporation,
Plaintiffs-counter-claim-defendants-Appellants,

v.

CENTRAL PLASTICS COMPANY,
an Oklahoma corporation,
Defendant-counter-claimant-Appellee.

[Filed Feb. 23, 1988]

ORDER AND JUDGMENT

Before MOORE and TACHA, Circuit Judges, and BRIMMER, Chief Judge.*

---

* Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8. The cause is therefore ordered submitted without oral argument.

This is an appeal from an interlocutory order of the district court granting defendant's motion to alter or amend a judgment. The record shows that on July 10, 1987, the district court entered judgment, which, inter alia, denied the award of attorney's fees to either party. Within the time allowed, defendant filed a motion under Fed. R. Civ. P. 52 and 59 to alter or amend the judgment. It was defendant's position that as prevailing party, it was entitled under state law to the award of attorney's fees. On August 5, 1987, the district court granted defendant's motion and directed the parties to make a good faith effort to agree on the amount of fees due. On September 2, 1987, plaintiff filed notice of appeal from the August 5 order. Significantly, the August 5 order did not set out the amount of attorney's fees to be recovered.

On October 26, 1987, the district court ordered that defendant recover from plaintiff the sum of $44,895.69 as a result of attorney's fees. No appeal is taken from that order.

We conclude that the October 26, 1987, order was final and appealable within the meaning of 28 U.S.C. § 1291 and that the challenged order was interlocutory and, consequently, not immediately reviewable.

This appeal, from an interlocutory order, is premature and must be dismissed for lack of jurisdiction.

Appeal is DISMISSED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant;

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Counterclaimant,

vs.

SANDY GOLGART, an individual, and SANDY GOLGART SALES, a California corporation,
Counterclaim Defendants.

[Filed June 10, 1987]

Patrick J. Malloy, III, MALLOY & MALLOY, INC., 1924 South Utica, #810, Tulsa, Oklahoma 74104 for plaintiff/counterclaim defendants.

Lucian Wayne Beavers, Suite 900, 101 Park Avenue, Oklahoma City, Oklahoma 73102 for Defendant and Counterclaimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Hon. Lee R. West, United States District Judge.

This matter came on for trial before the Court sitting without a jury on the parties' claims and counterclaims. Having heard the testimony of the witnesses and the arguments of counsel and having reviewed the documentary evidence and the parties' written submissions and supplemental authority, the Court makes the following factual findings and draws the following legal conclusions therefrom. Rule 52, F.R.Civ.P.

Findings of Fact

The Parties

1. The plaintiff, Sandy Golgart, is a resident of the state of California. Ms. Golgart is also a counterclaim defendant and counterclaimant.

2. The defendant, Central Plastics Company, is incorporated and has its principal and only place of business in Shawnee, Oklahoma. The defendant is also a counterclaimant and counterclaim defendant.

3. Sandy Golgart Sales, Inc., which is owned and under the complete control of Ms. Golgart, is a counterclaimant and counterclaim defendant. Said party is incorporated and has its principal place of business in California.

Plaintiff's Claims—Breach of Contract, Common Law and Statutory Fraud, Breach of Fiduciary Duty

4. The defendant is engaged in the manufacture and sale of products such as meter swivels and unions, flange insulation and transition fittings to various industrial customers and gas utility companies. *See, e.g.*, Defendants' Exhibits 39, 62.

5. In 1981 and 1982, the defendant was involved in a joint venture known as Paladin to market its products

and the plaintiff was employed by Paladin as a salesperson.

6. When the joint venture was dissolved, Bob Pourchot, then vice president in charge of sales and marketing for the defendant and now vice president and co-owner, approached the plaintiff about representing the defendant's product line.

7. In April 1982, the plaintiff entered into an oral agreement whereby the plaintiff agreed to act as an independent sales agent for the defendant in various western states and the defendant agreed to pay the plaintiff a fixed monthly rate of $4500.00. The plaintiff's geographical territory was ultimately changed and at one point included the Canadian province, British Columbia. The plaintiff's monthly compensation was also subsequently increased to $5000.00.

8. In December 1982, the plaintiff and five other individuals were invited to attend a meeting at the defendant's facility in Shawnee. In addition to the plaintiff, those invited were John Odusch, Kent Smith, Brian Miller, Buf Imai (also a former Paladin salesperson) and Ken Manchester. The defendant was represented at the meeting by President Phil Pourchot, Sales Manager Bob Schaffer and Bob Pourchot. Also present at the meeting was Don Orr, a certified public accountant who had been retained by the defendant as a consultant and who had prepared materials for the meeting regarding certain tax aspects of employment. Defendant's Exhibit 23.

9. Bob Pourchot advised these six invitees that the defendant was creating the position of "private contractor salesman" (private contractors) and was implementing a new compensation program which was designed not only to provide incentive to market more aggressively the defendant's products but also to eliminate the conflicts which arose at times with manufacturers' representatives.

10. The defendant further advised these six invitees that it nevertheless intended to continue utilizing the services of manufacturers' representatives, Defendant's Exhibit 102, but stressed that private contractors differed from manufacturers' representatives by allegiance to the defendant's products and by method of compensation. Private contractors were to market the defendant's products exclusively and would receive payment in accordance with the compensation program outlined at the 1982 meeting while manufacturers' representatives would market the products of different manufacturers and would be paid strictly on a commission basis.

11. The compensation program presented by Bob Pourchot at the December 1982 meeting was labeled the "3-tiered idea" and it called for a partial guarantee, partial commission arrangement which would ultimately result in the private contractor receiving fifty percent (50%) of his/her guaranteed monthly compensation and fifty percent (50%) of his/her earned commissions. *But see* Defendant's Exhibit 104. While each private contractor was given a different timetable for advancement, the format of the plans was similar. *Compare* Plaintiff's Exhibit B *and* Defendant's Exhibits 41 *and* 47 *with* Defendant's Exhibits 49, 54 *and* 104.

12. The plaintiff's particular compensation program as outlined by the document contained in the packet of materials she received at the 1982 meeting was structured as follows:

Year	Guaranteed Monthly Compensation	Commissions
January-June 1983	90%	10%
July-December 1983	75%	25%
1984	60%	50%
1985-1986	50%	50%

Plaintiff's Exhibit B; Defendant's Exhibit 27.

13. The possibility of all private contractors receiving one hundred percent (100%) commissions and no guar-

anteed monthly compensation was discussed at the meeting, and while the idea was not disregarded, no decision regarding the same was reached.

14. A distributors/resellers discount schedule and a commisison schedule were then in effect for manufacturers' representatives and remained so during the plaintiff's tenure with the defendant. Defendant's Exhibits 40, 147. These schedules were used in part to determine the discounts to be given to customers and the commissions to be paid to the private contracts on particular products.

15. To determine the price to be quoted to a customer and the commission rate to be applied in a particular instance, Bob Pourchot or other employee of the defendant, would in each instance engage in the following routine:

(a) the relationship with the customer seeking the quotation was examined to determine if any special prices had been previously offered;

(b) if no special quotations had been made, the standard price and discount were quoted and the standard commission rate was applied;

(c) if special quotations had been offered or if the instant circumstances so warranted, costs and profit margins were ascertained to determine the feasibility of a nonstandard quotation.

(d) the lower price was then compared to the list price to determine the discount rate;

(e) if the price was reduced by no greater than the standard discount of twenty-five percent (25%) from the suggested resale price, then the standard commission rate applied; if the price was discounted by greater than the standard twenty-five percent (25%), a reduced commission rate was assigned to the product;

(f) a copy of the quotation was then mailed to both the customer and the private contractor.

Defendant's Exhibits 109, 110, 111.

16. One document in the packet of materials provided the private contractors at the December 1982 meeting read in part that "[c]ommissions on special pricing under less 25% negotiable." Plaintiff's Exhibit B; Defendant's Exhibit 27. It is clear however that the private contractors played no part in the calculation of price, discount or commission rate except to the extent of supplying factual information regarding the customer's relationship with the defendant or the circumstances generating the instant quotation request.

17. From January 1983 to March 1983, the plaintiff was paid in accordance with the compensation schedule received at the December 1982 meeting ($5000.00 x 90% or $4500.00 as guaranteed monthly compensation plus 10% of all available commissions). At the plaintiff's request, the payment schedule was accelerated and in April 1983, the plaintiff began receiving fifty percent (50%) of her guaranteed monthly compensation ($2500.00) plus fifty percent (50%) of the available commissions. Defendant's Exhibit 31. The plaintiff continued to receive these amounts until her relationship with the defendant was terminated in February 1986.

18. Approximately by the fifteenth day of each month. the defendant mailed to the plaintiff a computer-generated "Salesman Statement," *e.g.*, Plaintiff's Exhibit G, and a check. The statement listed inter alia the invoices paid during the preceding month, the products sold, the commission rates applicable to such products and the amount of such commissions. The statement also reflected a handwritten calculation which showed the total dollar amount of commissions the private contractor was to receive; that is, it showed the total dollar amount of commissions multiplied by the percentage then in effect

under the private contractor's compensation program. In the plaintiff's case, commissions earned between January and March 1983 were multiplied by ten percent (10%) and commissions earned after March 1983 were multiplied by fifty percent (50%).

19. The commission rate to be applied on a particular quotation was also reflected in most cases on the private contractor's copy of the quotation. *E.g.*, Plaintiff's Exhibit O.

20. The defendant's computer was programmed to print on the Salesman Statement the standard commission rate assigned to each product. Unless an employee of the defendant company manually changed the commission rate for a particular product in a particular situation to reflect a nonstandard commission rate, the standard commission rate was printed on the Salesman Statement and thus received by the private contractor. Thus, often the commission rate reflected on the private contractor's copy of the quotation, *see* Finding of Fact 19, and reflected on the Salesman Statement did not match and thus would alert the private contractor to the fact that the appropriate commission rate had not been printed on the Salesman Statement.

21. The Salesman Statements received by the plaintiff from 1982 to 1986 were admitted into evidence. Plaintiff's Exhibit F. Rather than describe in detail each statement, the Court, while reviewing the documents, has selected the plaintiff's Salesman Statement for January 1986 (which forms the basis of and was summarized in the defendant's Exhibits 136 and 150) to highlight those instances where nonstandard commission rates were assigned and where standard commission rates were received even though under the defendant's guidelines, they need not have been applied.

Fifty-one invoices were paid during January 1986

(1) the plaintiff received standard commission rates on 35 of the 51 invoices even though only 16 of the 35 invoices were subject to the standard discount

the plaintiff received standard commission rates on the remaining 19 invoices because special quotations resulted in discounts of less than 25%, because the discounts were only slightly greater than 25%, because of clerical error (*see* Finding of Fact 20) or because special circumstances warranted

(2) the plaintiff received no commission on 1 of the 51 invoices because it was for replacement items which were provided at no charge to the customer

(3) the plaintiff received special commission rates on the remaining 15 invoices

(a) in 7 instances the commission rate was lowered from 5% to 3% due to greater than standard discounts

(b) in 2 instances the commission rate was lowered from 10% to 5% due to greater than standard discounts

(c) in 6 instances where no standard discounts existed, the quoted prices ranged from 15% to 65% off the suggested list prices and the commission rate was lowered from 10% to 3%

Defendant's Exhibits 136, 150.

22. During the December 1982 meeting, the private contractors inquired about the need of a written agreement which would document the relationship between the parties. Based upon the response of Mr. Orr that a written agreement would be "desirable" for tax pur-

poses, the private contractors were assured by Bob Pourchot that they would receive one.

23. In June 1983, Bob Pourchot sent each private contractor a written agreement. Plaintiff's Exhibit C; Defendant's Exhibits 43, 55. The agreement was drafted for use with manufacturers' representatives and while it did not reflect the agreement between the defendant and the private contractors or the "3-tiered idea," it was nonetheless distributed. The evidence demonstrates that the 1983 agreement was distributed to the private contractors for tax purposes only and was not examined by Bob Pourchot to determine whether it did in fact contain the compensation agreement between the defendant and the private contractors. The plaintiff did not execute this agreement but did continue to perform as a private contractor for the defendant under the "3-tiered idea" compensation program, as now accelerated.

24. In June 1984, Thom O'Hara, sales manager for the defendant, redistributed written agreements to the private contractors, one of which the plaintiff did execute. Plaintiff's Exhibit D; Defendant's Exhibit 79. The document entitled "Agent Agreement" had an effective day of May 1, 1984, and its was essentially identical to the 1983 written agreement except for the description of the plaintiff's geographical territory. The 1984 written agreement likewise did not refer to the "3-tiered idea" and the evidence demonstrates that the compensation program outlined by Bob Pourchot in December 1982, as now accelerated, although not reflected in the written agreement was intended to, and did continue, in force and effect. It is clear that there was no meeting of the minds with regard to the terms contained in the 1984 written agreement and that such document was not intended to, and did not alter or modify, the terms of the plaintiff's relationship with the defendant or the method of the plaintiff's compensation.

25. The evidence is disputed whether the 1984 written agreement comprised six pages, the sixth being "Schedule A" or seven pages, the seventh being the commission schedule. While Schedule A was neither signed nor given an effective date, such facts do not render the agreement unenforceable since the Court has already determined that the agreement itself has no force and effect.

26. These findings are supported (1) by the fact that during the June 1984 three-day sales meeting at which the plaintiff executed the 1984 Agent Agreement, the plaintiff met with Phill Pourchot, Bob Pourchot and Bob Shaffer to discuss her continuing and constant request to receive one hundred percent (100%) commissions and to forego the guaranteed monthly compensation and (2) by the fact that in November 1984, the plaintiff met again with Phill Pourchot and Bob Shaffer to discuss her compensation program.

27. While the evidence is clear that the plaintiff complained to the defendant's officers and employees about receiving only fifty percent (50%) of available commissions, the evidence is equally clear that there was no agreement that the plaintiff would receive one hundred percent (100%) commissions on the products sold.

28. Likewise, while the plaintiff inquired into the reasons certain standard commission rates were reduced or certain special commission rates were assigned, the plaintiff never sought reimbursement for the difference between the standard commission rate and the assigned commission rate save in those few instances where a mathematical or computer error had been made in the defendant's favor.

Defendant's Counterclaims—Breach of Contract (Failure to Return Confidential Information) and Misappropriation of Trade Secrets and Confidential Information

29. As a result of the plaintiff's relationship with the defendant, the plaintiff as well as counterclaim defendant Sandy Golgart Sales, Inc. (SGS), was provided many documents which the defendant considered confidential and to contain trade secrets.

30. At the time the plaintiff's relationship with the defendant was terminated, the defendant owed the plaintiff the sum of $4508.63. Defendant's Exhibit 64. This amount was tendered to the plaintiff on the condition that she return to the defendant these confidential materials. Defendant's Exhibit 66.

31. Evidence was presented regarding the return by the plaintiff of the requested documents, regarding the circumstances under which some of the materials were destroyed and regarding the confusion which surrounded plaintiff's counsel receipt of certain information and subsequent delivery of the same to defense counsel. Defendant's Exhibits 67, 68, 69, 70, 80.

32. Ms. Golgart, individually and on behalf of SGS, has agreed to execute a document wherein she states that she has now complied with all requests for production of documents and materials, that she no longer possesses any of the requested items and that she will not make use of, or refer to, any of the information contained in, or obtained from, these documents and materials. The defendant is directed to draft a document reflecting this agreement and to submit the same to the plaintiff for execution within ten (10) days hereof. The plaintiff is to forward the executed document to the Court and a copy to the defendant within five (5) days thereafter.

33. Since the defendant has admitted that the sum of $4508.63 is due and owing to the plaintiff and that it

withheld the same pending only the return of the confidential information, the Court finds that the defendant should remit said amount to the plaintiff within five (5) days after receipt by the defendant of the executed agreement.

Defendant's Counterclaims—Breach of Contract and Breach of Fiduciary Duty (Wrongful Competition)

34. It was understood between the plaintiff and the defendant that the plaintiff would not compete with the defendant during the term of her relationship with the defendant and that she would market exclusively the defendant's product line.

35. Southern California Gas Company of Los Angeles, California (SCGC), was located in the plaintiff's geographical territory and was one of the defendant's largest customers in this area. The defendant successfully bid many times items to SCGC including swivels which are fittings used to connect gas distribution lines to gas meters. *E.g.*, Defendant's Exhibit 5.

36. While the circumstances surrounding the events which led to the plaintiff's termination are in dispute, it appears that in June 1985 the plaintiff was approached by Gonzie Ballard, SCGC's purchasing agent, and asked to help secure for SCGC 13,000 elbow swivels. SCGC's current supplier, Hitachi, was unable to produce a sufficient quantity and SCGC was in a "critical buy" situation.

37. The plaintiff contacted Glenna Combs, the defendant's quotation manager, and requested the defendant to submit an immediate quotation. Defendant's Exhibit 3. The plaintiff was advised that the items could be produced at a cost of $2.97 each with a commission rate of five percent (5%) but that the delivery time for such items would be fourteen (14) weeks. *Id.*

38. This delivery schedule was unsatisfactory to SCGC and one solution to SCGC's problem was for a supplier to manufacture the elbow swivels itself rather than rely on middlemen and existing foundry schedules.

39. The plaintiff and SGS secured a pattern from SCGC, made arrangements for financing and took steps to manufacture the swivels for delivery to SCGC.

40. During the following months, the plaintiff and SGS filled four more such spot orders for SCGC and delivered to SCGC 43,243 items. *See* Defendant's Exhibits 87, 88, 89. At the time of her termination in February 1986 there was also an outstanding order for 11,900 additional swivels.

41. It is disputed whether the plaintiff suggested to Ms. Combs or other officers/employees of the defendant that the defendant should make the swivels itself. It is likewise disputed whether the plaintiff alerted the defendant of the urgent nature of SCGC's request or whether the plaintiff contacted the defendant each time she was approached by SCGC to fill a spot order. The evidence strongly supports a finding that only the first order was relayed to the defendant based upon the plaintiff's testimony that she believed the defendant would reject her subsequent requests due to its inability to deliver the items in the time period needed.

42. There was some contact with the defendant during these months regarding the sale of this product to SCGS, but such communications appear to concern the defendant's 1985 blanket bid to SCGC and not the spot order requests.

43. The plaintiff's evidence indicates that she and SGS earned approximately $150,372.00 but incurred expenses in an approximate amount of $149,550.00. Plaintiff's Exhibit P. The defendant's evidence indicates that the plaintiff and SGS earned (or would earn after pay-

ment for the back-ordered swivels) $146,374.64 and incurred expenses in the amount of $24,183.43. Defendant's Exhibit 90.

44. The plaintiff's and SGS's evidence shows a profit of $822.00, Plaintiff's Exhibit P, and the defendant's evidence shows a profit of $22,191.21. Defendant's Exhibit 97.

45. The actions of the plaintiff and SGS in providing the swivels to SCGC were in direct violation of the plaintiff's duty not to compete and of the plaintiff's duty to market the defendant's products exclusively and it was the defendant's discovery of these breaches which led to the termination of the plaintiff's relationship with the defendant on February 13, 1986. *See* Plaintiff's Exhibit L.

46. The Court finds such actions did not however result in the defendant's loss of its September 1985 blanket bid to SCGC for such item. This bid was made in the name of SGS, although on behalf of the defendant, on the premise that a female-operated company would have an advantage. Defendant's Exhibits 6, 7. Hitachi was the successful bidder for that line item and there is no evidence that in the absence of the actions of the plaintiff and SGS in filling the spot orders, the defendant would have been the successful bidder.

Plaintiff's and SGS's Counterclaim—Abuse of Process

47. The plaintiff and SGS filed a claim entitled "Counterclaim to the Counterclaim" wherein they have alleged that the defendant is liable for abuse of process in filing and litigating its counterclaims.

48. Based upon the confusing circumstances surrounding the return of the documents and based upon the clear breach of the plaintiff's duties as herein explained, the defendant had substantial grounds for filing its counter-

claim. There is no evidence that the commencement of such counterclaims was prompted by any ulterior motives.

Conclusions of Law

1. This Court has jurisdiction of this action under title 28, section 1332 of the United States Code.

Plaintiff's Claims

2. The plaintiff performed as a private contractor for the defendant from January 1983 to February 13, 1986. The relationship between the parties resulted from an oral agreement in December 1982 and the terms of such agreement were determined, and given meaning, by the parties' subsequent conduct and actions.

3. This agreement provided that the plaintiff would market exclusively the defendant's product line in a designated geographical territory.

4. It also provided that the plaintiff would receive a maximum of fifty percent (50%) of the plaintiff's guaranteed monthly compensation and a maximum of fifty percent (50%) of the commissions the plaintiff earned.

5. The agreement further provided that the commission rate to be applied in any given instance could be unilaterally changed at the discretion of the defendant. The defendant had in effect certain guidelines which it followed in determining the commission rate and which the Court has heretofore set forth. The defendant's actions in reducing standard commission rates and in assigning special commission rates pursuant to those guidelines were on the whole done in a consistent, reasonable and nonarbitrary manner.

6. The 1984 Agent Agreement executed by the parties did not, and was not intended to, alter or modify the terms of this oral agreement and in particular did not, and was not intended to, alter or modify the terms of the

plaintiff's compensation program. Such conclusion is supported by the parties' conduct subsequent to execution of the document.

7. Accordingly, the Court concludes that the parties acted in accordance with their oral agreement and thus, that the plaintiff has failed to prove that the defendant breached the same.

8. The Court concludes further that the plaintiff has failed to prove by clear and convincing evidence that the defendant defrauded the plaintiff or breached any of its fiduciary duties with regard to method of compensation and/or the terms of the agreement under which the plaintiff performed.

9. Under Oklahoma law, one element which a party must plead and prove in order to prevail on a claim of fraud is a material and false representation. *D & H Company v. Shultz*, 579 P.2d 821, 824 (Okla. 1978). As stated, the Court has found no evidence that the defendant misrepresented any of the terms of the parties' agreement and in the absence of the same, the plaintiff likewise cannot prevail on these claims.

Defendants' Counterclaims

10. With regard to the defendant's requests to require the plaintiff not only to produce all confidential documents and materials but also to refrain from using or referring to any of the information obtained therefrom, the Court concludes in light of Ms. Golgart's agreement as set forth in Finding of Fact 32, that these counterclaims seeking such injunctive relief will be resolved once such agreement has been executed.

11. With regard to the defendant's counterclaims for breach of contract as to the acts of the plaintiff and SGS vis-a-vis SCGS, the Court finds first that the plaintiff's duties which the defendant seeks to impose arise not from

the 1984 Agent Agreement but from the previous oral agreement. As stated the 1984 Agent Agreement has no force and effect and such finding is applicable to all aspects of the agreement.

12. The private contractors were advised at the 1982 meeting that they would market the defendant's product line exclusively and that this allegiance to the defendant's products distinguished the private contractors from the manufacturers' representatives. Hand-in-hand with this duty is the duty not to compete with the defendant and it is clear that the plaintiff and SGS offered to provide, and did indeed deliver to, SCGC a product which was in direct competition with a product manufactured by the defendant.

13. Accordingly, the Court concludes that the plaintiff and SGS has breached these duties and are liable to the defendant for damages resulting therefrom.

14. The plaintiff and SGS have contended that damages, if any, should be limited to profit less expenses or as their evidence first indicated, $822.00.

15. The defendant has sought damages in varying amounts under varying theories, the highest award $146,374.64 (alleged to be gross receipts) and the lowest award being $22,191.21 (net profit). Since the Court has concluded that the defendant failed to prove its consequential damages regarding the loss of the 1985 blanket bid as to that line item, the Court has considered only the foregoing figures as potential proper measures of damage. Likewise, the Court has found that the conduct of the plaintiff and under the standards imposed in this state, do not warrant the recovery of punitive damages. *E.g.*, 23 O.S. § 9.

16. The Oklahoma Supreme Court in *Roxana Petroleum Co. v. Goldrick*, 113 Okla. 298, 242 P. 228 (1925), stated that

> "[a]s a general rule it is a breach of good faith and loyalty to his principal for an agent, while the agency exists, so to deal with the subject-matter thereof, or with information acquired during the course of the agency, as to make a profit out of it for himself in excess of his lawful compensation; and if he does so he may be held as a trustee and be compelled to account to his principal for all profits, advantages, rights, or privileges acquired by him in such dealings, whether in performance or in violation of his duties, and be required to transfer them to his principal upon being reimbursed for his expenditures for the same . . . ."

Id. at —, 242 P. at 229.

17. In the absence of any Oklahoma authority to the contrary, the Court finds that the defendant is entitled on these counterclaims to recover from the plaintiff and SGS the difference between the profits gained by the plaintiff and SGS and the actual expenses incurred by these two parties. The difficulty lies not in determining the measure of damages, but in the amount to be awarded. The parties cannot agree on the actual expenses incurred by the plaintiff and SGS in manufacturing the swivels and delivering the same to SCGC. They have submitted various documents to support their respective claims as well as summaries of expenses believed to have been incurred and have also advanced reasons why the documents and claims of the opposing party should be disregarded.

18. The Court concludes that a preponderance of the documentary evidence and the more credible testimony of Ms. Golgart support a finding that she and SGS incurred expenses in the approximate amount of $149,550.00 and thus, received a net profit of $822.00 from their transactions with SCGC. Accordingly, the defendant is entitled to recover the latter amount.

Plaintiff's and SCS's Counterclaim to the Counterclaim

19. A cause of action for abuse of process exists under Oklahoma law when a party has maliciously misused or misapplied legal process to acomplish some purpose or to obtain some result not lawfully contemplated or not properly attainable thereby. *E.G., Neil v. Pennsylvania Life Insurance Co.*, 474 P.2d 961 (Okla. 1970); *see Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112 (10th Cir. 1983).

20. The gist of this cause of action is the improper use of legal process for an ulterior or improper purpose and it is the purpose for which this legal process is used that is the thing of importance and upon which the Court has focused in examining the parties' evidence.

21. The Court finds no evidence to support the claims of the plaintiff and SGS that the defendant's counterclaims were commenced to harass and intimidate these parties or to force the plaintiff to abandon her claims against the defendant.

22. Due to the confusion surrounding the return of the documents and due to the breach of duties by the plaintiff and SGS, the Court finds that the defendant was justified in filing and litigating its counterclaims and that commencement of such counterclaims as not prompted by any ulterior or improper purpose.

23. Accordingly, the Court finds that the plaintiff and SGS are not entitled to prevail on this counterclaim.

Conclusion

24. The Court hereby concludes in accordance with the foregoing that the plaintiff has failed to prove her claims of breach of contract, common law and statutory fraud and breach of fiduciary duty and that the defendant is entitled to judgment on such claims.

25. The Court concludes further that the defendant has proven its counterclaim of breach of contract with regard to the actions of the plaintiff and SGS in providing SCGC with swivels and is therefore entitled to judgment in the amount of $822.00 against said parties.

26. The Court also concludes that the defendant's counterclaim pertaining to the plaintiff's failure to return certain confidential documents and materials has been resolved and that upon compliance by the plaintiff with the Court's directives as set forth in the instant Findings of Fact and Conclusions of Law, that the plaintiff is entitled to recover the sum of $4508.63.

27. The Court further concludes that the plaintiff and SGS have failed to prove their counterclaim to the counterclaim for abuse of process and that the defendant is entitled to judgment on such counterclaim.

28. The Court concludes finally that under the circumstances of this case the parties are to bear their own attorneys' fees and costs of this action.

29. The parties are advised that since one matter remains to be finalized the Court has determined that entry of judgment should be temporarily delayed. Once the Court has received the agreement executed by Ms. Golgart, individually and on behalf of SGS, regarding the return and use of the confidential documents and materials (as set forth in Finding of Fact 32), the Court will enter judgment forthwith in accordance with these Findings of Fact and Conclusions of Law.

IT IS SO OREDRED this 18th day of June, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant;

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Counterclaimant,

vs.

SANDY GOLGART, an individual, and
SANDY GOLGART SALES, a California corporation,
Counterclaim Defendants.

[Filed July 10, 1987]

JUDGMENT

This action came on for trial before the Court, The Honorable Lee R. West, District Judge, presiding and the issues having been duly tried and Findings of Fact and Conclusions of Law having been duly entered, Rule 52, F.R. Civ. P.,

It is hereby ORDERED and ADJUDGED in accordance with these Findings of Fact and Conclusions of Law that the plaintiff, Sandy Golgart, take nothing by

way of her claims against the defendant, Central Plastics Company, and that these claims be dismissed on their merits.

It is further ORDERED and ADJUDGED that the defendant/counterclaimant, Central Plastics Company, recover of the plaintiff/counterclaim defendant, Sandy Golgart, and of the counterclaim defendant, Sandy Golgart Sales, Inc., the sum of $822.00 with interest thereon at the rate provided by law on its counterclaims for breach of contract and breach of fiduciary duty (wrongful competition). It is further ORDERED and ADJUDGED that the counterclaims for breach of contract (failure to return confidential information) and misappropriation of trade secrets and confidential information of the defendant/counterclaimant, Central Plastics Company, have been resolved upon the execution by the plaintiff/counterclaim defendant, Sandy Golgart, and counterclaim defendant, Sandy Golgart Sales, Inc., on July 6, 1987, of the Agreement drafted by the defendant/counterclaimant. It is further ORDERED and ADJUDGED that pursuant to the execution of this Agreement, the plaintiff, Sandy Golgart, is to recover from the defendant, Central Plastics Company, the sum of $4508.63.

It is further ORDERED and ADJUDGED that the plaintiff/counterclaimant, Sandy Golgart, and counterclaimant, Sandy Golgart Sales, Inc., take nothing by way of their "Counterclaim to the Counterclaim" and that this counterclaim be dismissed on its merits.

It is finally ORDERED and ADJUDGED that all parties to this action are to bear their own attorneys' fees and costs.

Dated at Oklahoma City, Oklahoma, this 10th day of July, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant;

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Counterclaimant,

vs.

SANDY GOLGART, an individual, and
SANDY GOLGART SALES, a California corporation,
Counterclaim Defendants.

NOTICE OF APPEAL

NOTICE is hereby given that Sandy Golgart, the plaintiff above named hereby appeals to the United States Court of Appeals for the 10th Circuit from the final judgment entered on the 13th day of June, 1987.

MALLOY & MALLOY, INC.

By /s/ Patrick J. Malloy III
PATRICK J. MALLOY III
1924 South Utica #810
Tulsa, Oklahoma 74104
(918) 747-3491

CERTIFICATE OF MAILING

I, Patrick J. Malloy III, hereby certify that on the 7th day of July, 1987, a true and correct copy of the Notice of Appeal was mailed to:

Lucian Wayne Beavers
Suite 900
101 Park Avenue
Oklahoma City, Oklahoma 73102

With proper postage thereon prepaid.

/s/ Patrick J. Malloy III
PATRICK J. MALLOY III

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,
v.
CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant;

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Counterclaimant,
v.
SANDY GOLGART, an individual, and
SANDY GOLGART SALES, a California corporation,
Counterclaim Defendants.

[Filed July 13, 1987]

DEFENDANT'S MOTION TO AMEND FINDINGS AND JUDGMENT REGARDING ATTORNEYS' FEES AND COSTS AND BRIEF IN SUPPORT THEREOF

MOTION

In paragraph 28 of the Conclusions of Law portion of the FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court concluded that the parties were to bear

their own attorneys' fees and costs of this action. On July 10, 1987, the Court entered a JUDGMENT in accordance with this conclusion.

Pursuant to Rule 52(b) and 59(e) of the Federal Rules of Civil Procedure, Defendant respectfully moves the Court to amend paragraph 28 of the Conclusions of Law portion of the FINDINGS OF FACT AND CONCLUSIONS OF LAW and to amend the JUDGMENT as follows:

1. To allow Defendant to recover reasonable attorneys' fees for defending Plaintiff's claims of breach of contract, common law and statutory fraud and breach of fiduciary duty, as set out in Counts I-IV of the Complaint; and

2. To allow Defendant to recover its costs for the entire action.

The basis for allowing Defendant to recover reasonable attorneys' fees for defending the claims set out in Counts I-IV of the Complaint is Section 936 of Title 12 of the Oklahoma Statutes. The basis for allowing Defendant to recover its costs for the entire action is Rule 54(d) of the Federal Rules of Civil Procedure.

After the Court rendered the FINDINGS OF FACT AND CONCLUSIONS OF LAW, Defendant filed a Motion to Amend Findings by the Court and Brief in Support Thereof. The Judgment was entered before this Motion and Brief were considered. The present Motion and Brief are identical to the first Motion and Brief except that Defendant is moving the Court to amend both the FINDINGS OF FACT AND CONCLUSIONS OF LAW and the JUDGMENT entered in accordance therewith.

BRIEF IN SUPPORT OF MOTION

I. *Introduction*

In Counts I-IV of the Complaint, Plaintiff claimed breach of contract, common law and statutory fraud and breach of fiduciary duty. As counterclaims, Defendant claimed breach of contract, breach of fiduciary duty and misappropriation of trade secrets and confidential information. Plaintiff and Sandy Golgart Sales then filed a Counterclaim to Defendant's Counterclaim, basically for abuse of process.

In the FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court concluded that Defendant was entitled to judgment on all of Plaintiff's claims, including the Counterclaim to Defendant's Counterclaim. The Court concluded that Defendant was entitled to recover damages for its counterclaims for breach of contract and breach of fiduciary duty, and concluded that Defendant's counterclaim for misappropriation of trade secrets and confidential information had been resolved. Finally, the Court concluded that each party was to bear their own attorneys' fees and costs. On July 10, 1987, a JUDGMENT was entered in accordance with these conclusions.

By the present Motion, the Court is requested to amend both the FINDINGS OF FACT AND CONCLUSIONS OF LAW and the JUDGMENT regarding attorneys' fees and costs. It is submitted that Defendant, as the prevailing party, is entitled to recover reasonable attorneys' fees for defending Plaintiff's claims for breach of contract, common law and statutory fraud and breach of fiduciary duty. In addition, it is submitted that Defendant should be allowed to recover its costs for the entire action.

II. *The Court Does Not Have Discretion to Deny Defendant Reasonable Attorneys' Fees for Defending Plaintiff's Direct Claims*

In a federal court case involving diversity jurisdiction, state law applies with respect to attorneys' fees. *See Comavi Int'l, Ltd. v. Rockwell Int'l Corp.*, 797 F.2d 912, 914 (10th Cir. 1986); *Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 610 (W.D. Okla. 1977); *Toland v. Technicolor, Inc.*, 467 F.2d 1045, 1047 (10th Cir. 1972).

According to the law of Oklahoma, in an action to recover on a contract for labor or services, the prevailing party is entitled to recover reasonable attorneys' fees. Section 936 of Title 12 of the Oklahoma Statutes provides:

> "In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject [of] the action, the prevailing party *shall* be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs. (emphasis added)

Okla. Stat. Ann. tit. 12, § 936 (West Supp. 1987)

Plaintiff's claims for breach of contract, common law and statutory fraud and breach of fiduciary duty clearly constituted an action to recover on a contract for labor or services. Plaintiff contended that she was entitled to recover over $200,000 from Defendant for past-due commissions. *See Bentley v. Hardin*, 577 P.2d 471, 475-476 (Okl. App. 1978).

A prevailing party is a party who won on the merits. *See e.g., Comavi Int'l Ltd. v. Rockwell Int'l Corp.*, 797 F.2d 912, 914 (10th Cir. 1986). Defendant prevailed on the merits on all the claims of this action.

Section 936 clearly and unambiguously uses the word "shall". In the construction of Oklahoma statutes, the word "shall" is generally interpreted to mean "must". Unless construction of the statute as a whole or legislative intent indicates otherwise, the word "shall" implies a command or mandate, and excludes the idea of discretion by the Court. *See, e.g., Sneed v. Sneed*, 585 P.2d 1363, 1364 (Okla. 1978); *Woods Development Co. v. Meurer Abstract and Title Co.*, 712 P.2d 30, 33 (Okla. 1985); *State v. Hunt*, 286 P.2d 1088, 1090 (Okla. 1955).

In accordance with the general rule, the word "shall" as it is used in Section 936 has been interpreted by the Oklahoma courts to mean "must". *See United Founders Life Insurance Co. v. Life Insurance Pension Headquarters Agency, Inc.*, 633 P.2d 763 (Okla. App. 1981); *E. V. Cox Construction Co. v. Brookline Associates*, 604 P.2d 867, 872-873 (Okla. App. 1979); *Dubuque Packing Co., Inc. v. Fitzgibbon*, 599 P.2d 440, 443 (Okla. App. 1979). The statute as a whole and the intent of the legislature support this interpretation.

In *United Founders Life Insurance Co. v. Life Insurance Pension Headquarters Agency, Inc.*, 633 P.2d 763 (Okla. App. 1981), the plaintiff sued to recover money allegedly owed to it by the defendant. Although the plaintiff was the prevailing party, the trial court did not allow it to recover attorneys' fees and costs. On appeal, the plaintiff asserted it was entitled to recover attorneys' fees under Section 936. The court agreed, stating:

> "This statute provides the Court *shall* award attorney fees to the prevailing party. The term "shall" has been consistently construed to mean "must". (citations omitted)

633 P.2d 763, 765, n. 1.

Thus, pursuant to Section 936 of Title 12 of the Oklahoma Statutes, this Court is required to allow Defendant to recover reasonable attorneys' fees for defending Plain-

tiff's claims to recover on a contract for services, i.e., Plaintiff's claims of breach of contract, common law and statutory fraud and breach of fiduciary duty.

III. *Defendant Should be Allowed to Recover Its Costs for the Entire Action*

Rule 54(d) of the Federal Rules of Civil Procedure provides that costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The only way Defendant could have avoided this litigation was to either pay Ms. Golgart a sum of money to which she was not entitled or possibly offer her job back to her. In choosing to defend the claims made against it, Defendant was required by Rule 13(b) of the Federal Rules of Civil Procedure to state as counterclaims the claims it had against Ms. Golgart and Sandy Golgart Sales at that time. Defendant certainly had no choice but to defend Ms. Golgart's counterclaim to its counterclaim.

The Court has ruled in favor of Defendant with respect to all of the disputed claims of this action. As a result, Defendant should be awarded all of its costs.

IV. Conclusion

It is respectfully submitted that this Court should amend paragraph 28 of the Conclusions of Law portion of the FINDINGS OF FACT AND CONCLUSIONS OF LAW and should amend the JUDGMENT entered in accordance therewith to allow Defendant to recover reasonable attorneys' fees for defending Plaintiff's claims of breach of contract, common law and statutory fraud and breach of fiduciary duty, and to allow Defendant to recover its costs for the entire action.

Pursuant to Section 936 of Title 12 of the Oklahoma Statutes, the Court does not have discretion to deny Defendant the attorneys' fees requested. Due to the fact that Defendant prevailed on all of the claims, it should be allowed to recover its other costs as well.

If the Court amends the FINDINGS OF FACT AND CONCLUSIONS OF LAW and JUDGMENT as requested by this Motion, Defendant will file applications for costs and attorneys' fees pursuant to Rule 6 of the Rules of this Court and Rule 54(d) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Clifford C. Dougherty III
C. Clark Dougherty, Jr.
Lucian Wayne Beavers
Clifford C. Dougherty, III
Laney, Dougherty, Hessin & Beavers
Suite 900, 101 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 232-5586

Attorneys for Defendant/ Counterclaimant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S MOTION TO AMEND FINDINGS AND JUDGMENT REGARDING ATTORNEYS' FEES AND COSTS AND BRIEF IN SUPPORT THEREOF has been mailed first class postage prepaid thereon this 13th day of July, 1987, to Patrick J. Malloy, III, MALLOY & MALLOY, INC., 810 Utica National Bank Building, 1924 South Utica Street, Tulsa, Oklahoma 74104.

/s/ Clifford C. Dougherty III

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 87-2023

SANDY GOLGART, an individual
Appellant

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Appellee

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Appellee,

vs.

SANDY GOLGART, an individual and SANDY GOLGART SALES, a California corporation,
Appellant

MOTION TO DISMISS APPEAL WITHOUT PREJUDICE

COMES now the Appellant in the above styled matter and in support of this Motion states:

1) The "Notice of Appeal" in these proceedings was filed on the 13th day of July, 1987, and was an appeal of the Court's Judgment filed on the 18th day of June, 1987.

2) On the 13th day of July, 1987, the Appellee filed in the United States District Court its Motion to Amend the Trial Court's Findings of Fact, Conclusions of Law and Judgment.

Under Rule 4(a)(4) of the Federal Rules of Appellate Procedures, "The time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing".

3) In order to avoid unnecessary work and confusion for the Appellate and United States District Court Clerk's office, the Appellant believes that it is in the best interests of the parties to dismiss the pending appeal without prejudice until such time as the District Court has ruled on pending post-judgment motions.

WHEREFORE, the appellant respectfully requests that the pending Appeal be dismissed without prejudice to the Appellant's refiling of the Appeal without additional costs subsequent to the District Court's ruling on pending Motions.

Respectfully submitted,

/s/ Patrick J. Malloy
PATRICK J. MALLOY III
MALLOY & MALLOY, INC.
Attorney for Appellant
1924 South Utica, #810
Tulsa, Oklahoma 74104
(918) 747-3491

CERTIFICATE OF MAILING

I, Patrick J. Malloy III, hereby certify that on the 28th day of July, 1987, a true and correct copy of the above and foregoing Motion to Dismiss Appeal Without Prejudice was mailed to:

Lucian Wayne Beavers
Suite 900
101 Park Avenue
Oklahoma City, Oklahoma 73102

With proper postage thereon prepaid.

/s/ Patrick J. Malloy
PATRICK J. MALLOY III

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM—July 27, 1987

Before ROBERT L. HOECKER, Clerk

No. 87-2023

(D.C. No. Civ-86-2026-W)

SANDY GOLGART, an individual,
Plaintiff-Counterclaim Defendant-Appellant,

SANDY GOLGART SALES, a California corporation,
Counterclaim Defendant,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant-Counterclaimant-Appellee.

Appellant's motion to dismiss is granted without prejudice to filing a new notice of appeal after the district court rules on the Fed. R. App. R. 4(a)(4) tolling motion. This appeal is dismissed.

A certified copy of this order shall stand as and for the mandate of this court.

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant;

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Counterclaimant,

vs.

SANDY GOLGART, an individual, and SANDY GOLGART SALES, a California corporation,
Counterclaim Defendants.

[Filed Aug. 5, 1987]

ORDER

On June 18, 1987, the Court entered its Findings of Fact and Conclusions of Law in this matter wherein the Court concluded that the parties were to bear their own attorneys' fees and costs. On July 10, 1987, the Court entered judgment in accordance with its findings and conclusions and affirmed in the Judgment its determina-

tion with regard to fees and costs. The matter now comes before the Court on the Motion to Amend Findings and Judgment of the defendant, Central Plastics Company, and the response in opposition of the plaintiff, Sandy Golgart.

After consideration of the evidence, the Court determined that the plaintiff had failed to prove that she was entitled to one hundred percent (100%) commissions on the products she sold for the defendant or that she was entitled to reimbursement for the difference between the standard commission rates and the assigned commission rates for those times when she received reduced commissions and thus, the Court found that the plaintiff has failed to prove her claims of breach of contract, common law and statutory fraud and breach of fiduciary duty.

The defendant has argued first that because judgment was entered in its favor on these claims it is the prevailing party for purposes of title 12, section 936 of the Oklahoma Statutes and that under this section, the Court has no discretion in awarding fees to the defendant. Section 936 provides in part that

> "[i]n any civil action to recover on . . . [a] contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services . . . the prevailing party *shall* be allowed a reasonable attorney fee . . . ."

12 O.S. § 936 (emphasis added).

In *Russell v. Flanagan*, 544 P.2d 510 (Okla. 1975), the Oklahoma Supreme Court stated that

> "the addition of the phrase 'or for labor or services' by amendment to the statute in 1970 was intended by the legislature to be limited to those situations where suit is brought for labor and services rendered . . . . [A]n improper and unintended meaning would result if . . . this clause were construed to allow at-

> torney fees in the all encompassing field of 'contracts related to . . . labor or services.' "

Id. at 512. This language was clarified in *Burrows Construction Co. v. Independent School District*, 704 P.2d 1136 (Okla. 1985), wherein the supreme court stated that

> "[i]t is the underlying nature of the suit itself which determines the applicability of the labor and services provision of section 936. If the action is brought for labor and services rendered, the provisions of section 936 apply. If the nature of the suit is for damages arising from the breach of an agreement relating to labor and services the provisions of this section do not necessarily apply. The question is whether the damages arose directly from the rendition of labor or services, such as a failure to pay for those services, or from an aspect collaterally relating to labor and services, such as loss of profits on a contract involving the rendition of labor and servic[illegible]."

Id. at 1338 (footnotes omitted).

The instant plaintiff has argued that because an oral agreement existed between the parties, the decision in *Russell* dictates a finding that section 936 is inapplicable. The Court however finds that the plaintiff has misinterpreted the supreme court's statements.

In determining whether section 936 authorizes the recovery of fees in this situation, the Court must decide only whether the lawsuit was brought to recover damages for labor and services rendered. The existence of a contract between the parties is immaterial. *Hamilton v. Telex Corporation*, 576 P.2d 769, 770 (Okla. 1978) (action brought for failure to pay for services rendered; existence of contract not material to outcome); *e.g.*, *E.V. Cox Construction Co. v. Brookline Associates*, 604 P.2d 867 (Okla. App. 1979) (*Russell* did not mean to suggest that award under section 936 is precluded where recovery

is sought for services rendered pursuant to a contract relating to such services).

The instant plaintiff did indeed, under various theories of recovery, claim entitlement to, and seek reimbursement for, commissions allegedly due and owing for services rendered on behalf of the defendant between 1983 and February 1986. These claims clearly bring the plaintiff's lawsuit within the category of a "civil action to recover . . . for labor or services . . . ." 12 O.S. § 936. The Court finds further that the use of the word "shall" in section 936 which has consistently been construed by Oklahoma courts to mean "must" mandates recovery of a reasonable attorney's fee by the instant defendant as the prevailing party on the plaintiff's claims for defending said claims.

The defendant has also moved the Court to reconsider its position with regard to costs. Rule 54(d), F.R. Civ. P., unlike section 936, does vest the Court with discretion and in reviewing the circumstances of this case, the Court affirm its decision that every party is to bear its own costs of this action.

Accordingly, the Court finds that the defendant's Motion to Amend Findings and Judgment is GRANTED to the extent that it seeks recovery of attorneys' fees and is DENIED to the extent that it seeks recovery of costs. The Court finds further that Paragraph 28 of the Conclusions of Law entered in this matter on June 18, 1987, is AMENDED to read:

> "28. The Court concludes finally that the defendant, as the prevailing party on the plaintiff's claims, is entitled under title 12, section 936 of the Oklahoma Statutes to recover a reasonable attorney's fee in defending these claims but under the circumstances as presented to the Court, that the parties are to bear their own costs of this action. Rule 54(d), F.R. Civ. P."

The Court finds further that the penultimate paragraph of the Judgment entered in this matter on July 10, 1987, is AMENDED to read:

> "It is finally ORDERED and ADJUDGED that the defendant as the prevailing party on the plaintiff's claims is to recover of the plaintiff a reasonable attorney's fee for defending such claims and that all parties to this action are to bear their own costs."

The defendant is DIRECTED to confer with the plaintiff in a good faith effort to agree upon the amount of fees to be recovered and if no agreement can be reached, to submit its motion in accordance with Rule 6, Rules of theh United States District Court for the Western District of Oklahoma, and in the time prescribed by this Court in its Order of July 13, 1987.

ENTERED this 5th day of August, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-2026-W

SANDY GOLGART, an individual
Appellant,
vs.
CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Appellee

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Appellee,
vs.
SANDY GOLGART, an individual, and
SANDY GOLGART SALES, a California corporation,
Appellant.

[Filed Sept. 2, 1987]

NOTICE OF APPEAL

Notice is hereby given that Sandy Golgart, the plaintiff above named hereby appeals to the United States Court of Appeals for the 10th Circuit from the final judgment entered on the 5th day of August, 1987.

MALLOY & MALLOY, INC.

By /s/ Patrick J. Malloy III
PATRICK J. MALLOY III
1924 South Utica, #810
Tulsa, Oklahoma 74104
(918) 747-3491

CERTIFICATE OF MAILING

I, Patrick J. Malloy III, hereby certify that on the 31st day of August, 1987, a true and correct copy of the above and foregoing Notice of Appeal was mailed to:

Lucian Wayne Beavers
Suite 900
101 Park Avenue
Oklahoma City, Oklahoma 73102

With proper postage thereon prepaid.

/s/ Patrick J. Malloy III
PATRICK J. MALLOY III

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 87-02358

SANDY GOLGART, an individual,
Plaintiff-Appellant,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma corporation,
Defendant-Appellee.

[Filed Dec. 8, 1987]

MEMORANDUM BRIEF IN SUPPORT OF THIS COURT'S JURISDICTION OF THE PENDING APPEAL

PRELIMINARY STATEMENT OF FACTS

On the 18th day of June, 1987, the Trial Court entered its "Findings of Fact, and Conclusions of Law". On July 10, 1987, the Court entered judgment in accordance with its Findings and Conclusions and affirmed in the Judgment its determination with regard to fees and costs. Thereafter, the plaintiff (Appellant), Sandy Golgart (Golgart)timely filed her "Notice of Appeal" on the 13th day of July, 1987.

On the 13th day of July, 1987, the defendant (Appellee), Central Plastics Company (Central), filed its Motion to Amend or Alter the Trial Court's Findings wiht respect to an award of attorney fees.

Counsel for both Central and Golgart conferred relative to the significance and effect of Central's post judgment Motion. *Both* parties agreed that the effect of the Motion was to "toll" the running of the time for appeal under Rule 4(a) of the Federal Rules of Appellate Procedure. The parties further agreed that the pending "Notice of Appeal" had "no effect" under Rule 4 because the appeal was filed "before the disposition of" Central's motion. Both counsel agreed that to continue the appeal under these circumstances would create a burden to all parties concerned, including the respective Clerk's offices and ultimately result in a duplication of time and effort.

Counsel for Colgart then conferred with the Clerk's office in the 10th Circuit. Again, the consensus was that Central's Motion was, in fact, a Motion to "amend" or "alter" the Court's decision and that under Rule 4(a), the pending Appeal had no effect.

After conferring with opposing counsel and the 10th Circuit Clerk's office, counsel for Golgart believed it was in the interests of all parties to dismiss the pending appeal without prejudice to refiling after the Trial Court had resolved Central's post judgment Motion.

On the 5th day of August, 1987, the Trial Court did, in fact, rule on the post-trial Motion and a second Notice of Appeal was timely filed by Golgart on the 2nd day of September, 1987.

Attached hereto as Exhibit "A" is counsel's Affidavit in support of the facts stated herein.

The Appellate Court is now considering summary dismissal of the appeal for the apparent reason that Central's post-judgment Motion related to attorney fees

which was and is a matter of collateral to the Court's decision on the "merits" of the case—and thus was not a true Rule 59 motion which would trigger the application of Fed. R. Appl. P. 4(a)(4). If that is the case, the second appeal was untimely and this Court would not have jurisdiction of the appeal.

Pursuant to the Court's Order of November 23, 1987, Golgart submits this Memorandum Brief on the issue of this Court's jurisdiction of the pending appeal.

PROPOSITION ONE: *Central's Motion Did Not Address A Matter That Was Collateral To The Trial Court's Initial Judgment.*

This Court has referred counsel to three specific cases which essentially stand for the proposition that post-judgment Motions for attorney fees address matters which are collateral to the Court's final judgment. See *White v. New Hampshire*, 455 U.S. 445, 102 S. Ct. 1162 (1982); *Autorama Corp. v. Stewart*, 802 F.2d 1284 (10th Cir. 1986); *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982). As a result, these cases would seem to suggest that post-judgment Motions for fees do *not* trigger the application of Rule 4(a).

However, the instant case can be distinguished from all three cases cited above and the distinction has been recognized by at least one Circuit Court. In the cases cited, the prayer for attorney fees was raised for the first time in a post-judgment Motion and was, therefore, truly collateral to the final Order. In the instant case, the entitlement to attorney fees was a matter raised by both Golgart and Central prior to trial and was, therefore, an integral part of the Court's judgment denying fees to either party.

Golgart's claim against Central was based on an alleged breach of her employment contract. In all pre-trial pleadings, including the pre-trial order, trial briefs, pro-

posed findings and conclusions, etc., Golgart and Central referred to the award of fees to the prevailing party in a contract dispute under 12 Okla. Stat. 936.

The Trial Court's initial findings and conclusions directed that each party should pay their own fees. Central's post-judgment Motion to amend or alter this finding did *not* therefore, raise a matter that was "collateral" to the Trial Court's initial judgment.

In *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985); the Court addressed this very issue at page 527 of the opinion:

> "We hold that the time period was tolled. Although a post-judgment motion containing an initial request for attorney's fees will not toll the appeals period, *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); *Smillie v. Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983), the plaintiff initially requested attorney's fees in the complaint rather than in his post-judgment motion. Moreover, the magistrate ruled against Ward on the attorney's fee issue in the written opinion rather than deferring the question. This court has previously distinguished between requests for attorney's fees made in the complaint, and similar requests made only after judgment. See *Smillie*, 710 F.2d at 274. Since Ward's post-judgment motion was properly filed under F.R.C.P. 59(e), it tolled the period for filing the notice of appeal.

Attached hereto as Exhibit "E" and "C" are true and exact copies of Golgart's original prayer for damages which include a request for damage; and Central's Answer and Counter-Claim which also includes prayer for fees.

PROPOSITION TWO: *Appellant (Golgart) In Good Faith Relied Upon Judicial Action Which Seemingly Extended The Appeal Period.*

Clearly, the Appellant has acted diligently responsibly and in good faith in this case. The original appeal was timely filed. That appeal was not lightly dismissed. The dismissal occurred only after:

1) Central filed its Motion to Amend or alter the final judgment.

2) Counsel for Central and Golgart had conferred about the effect of the Motion under Rule 4(a).

3) Counsel's review of the Rule and applicable law.

4) Conference with the 10th Circuit's Clerk's office.

Appellant *and* Appellee believed, in good faith, that the Motion to Amend did, in fact, trigger Rule 4(a). If that belief is ultimately determined to be incorrect, Appellant would nevertheless request this Court to permit the pending appeal on the basis of Appellant's good faith actions.

Appellant would refer the Court to *Aviation Enterprises, Inc. v. Orr*, 716 F.2d 1403 (1983).

There is the following language in the syllabus at page 1404:

> "1) Federal Courts—Party may maintain otherwise-untimely appeals in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action which seemingly extended the appeal period if the court's action occurs prior to the expiration date of the official period and appellant filed a notice of appeal before expiration of the period apparently judicially extended."

There is the additional language found in footnote #25 at page 1406:

> "25. Notice of Appeal, filed March 5, 1982, *Aviation Enterprises, Inc. v. Orr*, No. 81-2497 (D.D.C.). It may be that the District Court's action on January 5, 1982—vacating in full yet at once partly rein-

stating its prior order—might better be regarded in the aggregate simply as a partial vacatur of that order. In this light, the order by which Huff Leasing is aggrieved—that which vacated the award to it—issued on November 25, 1981, not January 5, 1982. Because Huff's Leasing filed its notice of appeal far beyond the 60-day period commencing November 25, 1981, pursuant to Federal Appellate Rule 4(a), it might seem superficially that Huff Leasing lost its appeal on this account. See Fed. R. App. P. 4(a). Upon closer inspection, however, it becomes clear that there is no cause for concern. Even if we were constrained to regard the court's action on January 5, 1982, as effecting only a partial vacatur of its earlier order, a question we do not here decide, Huff Leasing's delayed filing of its notice of appeal is not fatal in this instance. *Courts long have permitted parties to maintain otherwise untimely appeals in "unique circumstances"—those in which the appellant reasonably and in good faith relies upon judicial action seemingly extending the appeal period, provided that the court's action occurs prior to expiration of the official period and that the appellant files a notice of appeal before expiration of the period apparently judicially extended.* See *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 386-387, 84 S.Ct. 397, 398-399, 11 L.Ed.2d 404, 406-407 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 83 S.Ct. 263, 285, 9 L.Ed.2d 261, 263 (1962); *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 398 (7th Cir.), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 237 (1981); *Webb v. Department of Health and Human Servs.* 696 F.2d 101 (D.C. Cir. 1982), at 105-106; 4 C. Wright & A. Miller, Federal Practice Sec. 1168 (1969). The case at hand presents us with such "unique circumstances." Within 60 days the District Court purportedly vacated its initial

> order and simultaneously issued a superseding order, from which a new 60-day period ostensibly would begin to run. Huff Leasing then filed its notice of appeal before expiration of the new period, apparently in reliance upon actual extension thereof. Accordingly, even if the District Court's action on January 5, 1982, cannot in fact establish a new 60-day period under Rule 4(a), Huff Leasing's appeal is not to be dismissed for untimely filing.

Based on this authority and Appellant's action in this case, counsel would request this Court to either conclude that the Appeal is timely or, in the alternative, permit the appeal under circumstances which reveal good faith reliance on judicial action which at least appeared tc toll the time for appeal.

CONCLUSION:

Appellant believes that the pending appeal was timely because:

a) Both parties raised the issue of attorney fees prior to trial.

b) The Trial Court's findings and conclusions denied either party an award of fees.

c) Central's post-judgment Motion requesting the Trial Court to alter its judgment relative to fees did *not* address a matter "collateral" to the Court's judgment.

d) Central's Motion did, therefore, trigger Rule 4(a)'s tolling language.

Moreover, Appellant would further argue that she has acted in good faith and that the Appeal should be permitted to go forward even if Central's Motion was *not* a Rule 59 motion.

Finally, Appellant would request this Court to reinstate the original appeal if it concludes the pending Ap-

peal is not timely—again on the basis that Appellant has, at all times, acted in good faith and that in the interest of justice, she should be permitted to pursue her Appellate rights and remedies.

Respectfully submitted,

MALLOY & MALLOY, INC.

By _____

PATRICK J. MALLOY III
Attorney for Appellant
1924 South Utica, #810
Tulsa, Oklahoma 74104
(918) 747-3491

CERTIFICATE OF MAILING

I, Patrick J. Malloy III, hereby certify that on the —— day of December, 1987, a true and correct copy of the above and foregoing Memorandum Brief In Support of This Court's Jurisdiction of the Pending Appeal was mailed to:

Lucian W. Deavers
Suite 900
101 Park Avenue
Oklahoma 73102

With proper postage thereon prepaid.

PATRICK J. MALLOY III

EXHIBIT "A"

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Patrick J. Malloy III, being duly sworn deposes and says:

1) That the undersigned has, at all times material herein, acted as counsel to Sandy Golgart (Golgart), the Appellant herein.

2) That subsequent to the filing of the Trial Court's findings and conclusions of law, I prepared and timely filed a Notice of Appeal for and on behalf of Golgart on the 13th day of July, 1987.

3) That on the 1st day of July, 1987, the Appellee, Central Plastics Company (Central) filed its Motion to Amend or Alter the Trial Court's Judgment with respect to attorney fees.

4) That I conferred with counsel for Central and a member of the Clerk's office in the 10th Circuit.

As a result of these conferences, I concluded that Central's Motion triggered Rule 4(a) of the Federal Rules of Appeals Procedure and that the pending appeal had no effect. Moreover, I concluded that unless the appeal was dismissed, all parties involved, including the respective clerk's offices, would labor under unnecessary and duplicitous work. I, therefore, concluded that the best course of action was to dismiss the appeal without prejudice to refilling after the trial court's ruling on Central's Motion.

5) I subsequently timely refiled an Appeal on the 2nd day of September, 1987, after the Trial Court had deposed of Central's Motion to Amend or Alter.

PATRICK J. MALLOY III

Sworn to before me this — day of December, 1987.

Notary Public

My Commission Expires:

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-2026-W

SANDY GOLGART, an individual,
Plaintiff,

vs.

CENTRAL PLASTICS COMPANY, an Oklahoma Corporation,
Defendant,

CENTRAL PLASTICS COMPANY, an Oklahoma Corporation,
Counterclaimant,

vs.

SANDY GOLGART, an individual, and SANDY GOLGART SALES, a California Corporation,
Counterclaim Defendants.

[Filed Oct. 26, 1987]

ORDER

This matter is now before the Court for consideration of the Findings and Recommendations made by Magistrate Doyle W. Argo after he conducted a hearing on the Defendants' Motion for Attorney Fees.

A review of the Findings and Recommendations leads the Court to the conclusion that said Findings and Rec-

ommendations are reasonable. Further, neither party has filed any objection to the Findings and Recommendations of the Magistrate within the time period provided by Local Court Rule 39.

Based upon the above, this Court adopts the Magistrate's recommendation. It is therefore ordered that the Defendants' attorneys have and recover from the Plaintiff the sum of $44,895.69 as a reasonable attorneys fee.

IT IS SO ORDERED THIS 26th DAY OF OCTOBER, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

No. 87-1933

In The

Supreme Court of the United States

October Term, 1987

SANDY GOLGART, AN INDIVIDUAL,
SANDY GOLGART SALES, A CALIFORNIA
CORPORATION,

Petitioner

v.

CENTRAL PLASTICS COMPANY,
AN OKLAHOMA CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

CASES

STATUTES

RULES OF PROCEDURE

No. 87-1933

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Petitioner

v.

CENTRAL PLASTICS COMPANY, AN OKLAHOMA CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Central Plastics Company (Central),[1] the Respondent herein, respectfully submits that the above-entitled cause should not be reviewed by this Court for the following reasons.

QUESTION ONE, raised by Petitioner Golgart as to whether Central's motion under F.R.Civ.P. 52 and 59 was a tolling motion under F.R.A.P. 4(a)(4), is not truly in

[1]In accordance with Supreme Court Rule 28.1, Central notes that it is affiliated with The Tako Company, an Oklahoma corporation.

issue because that question was not decided adversely to Golgart by the Court of Appeals.

It is apparent from the Court of Appeals' decision of February 23, 1988, that the Court accepted Golgart's position that Central's motion was a proper motion under Rules 52 and 59 which tolled the time for filing a notice of appeal. The Court of Appeals stated that, "Within the time allowed, defendant filed a motion under Fed.R. Civ.P. 52 and 59 to alter or amend the judgment." (ORDER AND JUDGMENT of February 23, 1988, included as APPENDIX A to Petition for Writ of Certiorari).

As Golgart has correctly argued regarding QUESTION ONE, the motion filed by Central on July 13, 1987, entitled DEFENDANT'S MOTION TO AMEND FINDINGS AND JUDGMENT REGARDING ATTORNEYS' FEES AND COSTS AND BRIEF IN SUPPORT THEREOF was in fact a tolling motion under F.R.A.P. 4(a)(4). The trial court had specifically addressed the issue of attorneys' fees in its July 10, 1987, judgment and in its earlier findings. Thus, Central's motion under F.R.Civ.P. 52 and 59 requesting amendment of that judgment addressed issues which were integral in and not collateral to the judgment and served to toll the running of the time for filing of a notice of appeal under F.R.A.P. 4(a)(4). *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985).

Since the time for filing a notice of appeal was tolled, Golgart's first filed notice of appeal was moot, and in accordance with F.R.A.P. 4(a)(4):

> A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

QUESTION TWO raised by Golgart was never reached by the Court of Appeals, nor should it be by this Court, since that question assumes that Central's motion was not a tolling motion.

Thus, the only issue which the Court of Appeals decided adversely to Golgart was that which Golgart has styled as QUESTION THREE, namely whether Golgart timely filed a new notice of appeal after the Rule 52 and 59 motion was finally disposed of.

This really is only a question of interpretation of the above-quoted language from F.R.A.P. 4(a)(4). It is clear that a new notice of appeal must be filed; the only question is when.

The new notice must be filed "within the prescribed time" (thirty days) "from the entry of the order disposing of the [Rule 52 and 59] motion". F.R.A.P. 4(a)(4).

The "order disposing of the [Rule 52 and 59] motion" must of course be an order *finally* disposing of that motion. An interlocutory order dealing with the motion, which does not finally dispose of the motion, does not start the time for filing the new notice of appeal running. 28 U.S.C. § 1291.

Once the proper issue is isolated in this manner, it becomes apparent that the Court of Appeals' decision of February 23, 1988, dismissing Golgart's appeal as being from an interlocutory order was proper. There is nothing special about the circumstances of this case which would merit review by this Court.

Central's post-trial motion under Rules 52 and 59 to amend the findings and judgment regarding attorneys'

fees was not *finally* disposed of until both entitlement and amount were determined.

The August 5, 1987, order from which Golgart appealed was an interlocutory order determining only entitlement.

The trial court did not enter an order *finally* disposing of the motion under Rules 52 and 59 until its order of October 26, 1987. That is when the time for filing a new notice of appeal as required by F.R.A.P. 4(a)(4) began to run, and no notice of appeal was timely filed.

Golgart has contended in her petition that this Court should review this case because of some conflict between the Tenth Circuit's decision and previous decisions of this Court or of other circuits. It is not apparent what that conflict is. Certainly with regard to QUESTION THREE, Golgart has not pointed out any such conflict.

The only authority cited by Golgart as supportive of her position on QUESTION THREE is the Tenth Circuit's own prior decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982).

Even if there were conflict between that decision and the Tenth Circuit's decision in the instant case, that would not be an appropriate ground for invoking this Court's review by a petition for writ of certiorari. Supreme Court Rule 17.

Further, the *Cox* case is not applicable to the instant situation. *Cox* did not deal with the question of when a post-trial motion under Rules 52 or 59 was finally disposed of so as to start the time for filing a notice of appeal running anew. Cox dealt with the very different question of

whether a judgment finally disposing of the merits was appealable even though questions relating to attorneys' fees were yet undecided, in the situation where there had not been a tolling post-trial motion.

In conclusion, the Respondent, Central Plastics Company, respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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Counsel of Record
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